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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

AARON P. PRITT
Radioman Seaman, U.S. Navy,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

THE MILITARY'S HIGHEST COURT RECENTLY HELD THAT THE PRESIDENT OF THE UNITED STATES, IN HIS ROLE AS COMMANDER-IN-CHIEF OF THE ARMED FORCES, DOES NOT HAVE THE POWER TO LIMIT WHEN A COURT-MARTIAL IMPOSES PUNISHMENT. THIS HOLDING RAISES THREE FUNDAMENTAL FEDERAL QUESTIONS THAT WARRANT IMMEDIATE REVIEW BY THIS COURT:

1. Whether Congress is the only body that can empower the President to establish binding and determinate sentencing and punishment standards in courts-martial, or whether the President, as Commander-in-Chief, has inherent authority to prescribe certain limitations on punishment for members of the military.

2. Whether the President, in executing his duties under Article II, Section 2, Clause 1, of the Constitution, has the power to regulate how or when members of the military are punished, even absent a specific statute delegating such authority.

3. Whether the President can suspend the application of a congressionally enacted offense through the promulgation of an executive order, and give members of the military greater substantive and procedural protections than those conveyed by Congress.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND EXECUTIVE ORDER INVOLVED 2

STATEMENT 2

I. Introduction 2
II. The Underlying Facts and Proceedings 4

REASONS FOR GRANTING THE PETITION 6

I. Review is Warranted in this Case to Ensure that the Legislative Branch of the Government Does Not Unconstitutionally Interfere with the Historically Recognized Power of the President To Punish Members of the Military 9

II. Review is Warranted because Congress has Clearly Delegated to the President the Power to Determine Punishments in Courts-Martial, and the Lower Court's Decision Undermines this Constitutionally Permissible Exercise of Executive Discretion 11

CONCLUSION 23

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Davis v. United States,
512 U.S. 452 (1994) 22
Dynes v. Hoover,
61 U.S. (20 How) 65 (1858) 4, 5
General Motors Corp. v. United States,
496 U.S. 530 (1990) 21
Gozlon-Peretz v. United States,
498 U.S. 395 (1991) 17, 21
Gusik v. Schilder,
340 U.S. 128 (1950) 19
Kurtz v. Moffitt,
115 U.S. 487 (1885) 5
Miller v. French,
530 U.S. 327 (2000) 17
Mistretta v. United States,
488 U.S. 361 (1989) 14
Ratzlaf v. United States,
510 U.S. 135 (1994) 17
Rewis v. United States,
401 U.S. 808 (1971) 21
Russello v. United States,
464 U.S. 16 (1983) 21
Swaim v. United States, 28 Ct. Cl. 173 (1893),
aff'd, 165 U.S. 553 (1897) 4, 5, 6, 12
United States v. Bass,
404 U.S. 336 (1971) 22
United States v. Burgess,
32 M.J. 446 (C.M.A. 1991) 7
United States v. Caceres,
440 U.S. 741 (1979) 14
United States v. Curtis,
32 M.J. 252 (C.M.A. 1991) 14

United States v. Davis,
47 M.J. 484 (1998) 16
United States v. Dickerson, ___ U.S. ___,
120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) 23
United States v. Edwards,
42 C.M.R. 374 (A.C.M.R. 1970) 14
United States v. Evans,
333 U.S. 483 (1948) 15
United States v. Granderson,
511 U.S. 39 (1994) 21
United States v. Harris,
29 M.J. 169 (C.M.A. 1989) 7
United States v. Jones,
34 M.J. 1229 (N.M.C.M.R. 1992) 7
United States v. Landgraf,
511 U.S. 244 (1994) 21
United States v. Merritt,
1 C.M.R. 56 (C.M.A. 1951) 18
United States v. McGraner,
13 M.J. 408 (C.M.A. 1982) 14
United States v. Scheffer,
523 U.S. 303 (1998) 14, 15
United States v. Smith,
32 C.M.R. 105 (C.M.A. 1962) 14
United States v. Thomasson,
50 M.J. 179 (1999) 7
Washington Market Co. v. Hoffman,
101 U.S. 112 (1879) 17, 18, 19
Whalen v. United States,
445 U.S. 684 (1980) 15
Wiltberger v. United States,
18 U.S. (5 Wheat) 76 (1820) 21

Statutes, Rules and Constitutional Provisions:

10 U.S.C. § 803 18
10 U.S.C. § 836 ..... 12, 14
10 U.S.C. § 818 ..... 12, 20
10 U.S.C. § 856 ..... 12, 20
10 U.SC. § 895(2) ..... *passim*
10 U.S.C. § 895(4) 22
10 U.S.C. § 906a 20
10 U.S.C. § 911a 20
28 U.S.C. § 1259(3) 4
Act of Sept. 27, 1890, ch. 998, 26 Stat. 491 9
Pub. L. No. 104-106, Title XI, § 1112,
110 Stat. 461 (1996) 19
Pub. L. 98-206, Dec. 6, 1983, 97 Stat. 1403 20
Pub. L. 99-145, Title V, § 534(a), Nov. 8, 1985,
99 Stat. 634 20
Executive Order 13, 086,
63 Fed. Reg. 30,065 , 30,086 (1998) ..... *passim*
U.S. CONST. art. II, § 2, cl. 1 ..... 4, 23
U.S. CONST. art. I, § 8, cl. 14 ..... 10, 14

Other Authorities:

2 N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION
(C. Sands 5th rev. ed. 1994) 17, 19

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PETITION FOR A WRIT OF CERTIORARI

Radioman Seaman Aaron P. Pritt, United States Navy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The initial decision of the Navy-Marine Corps Court of Criminal Appeals affirming Petitioner's conviction (App., *infra*, at 9a-15a)[1] is reported at 52 M.J. 546. The decision of the Court of Appeals for the Armed Forces affirming this decision (App., *infra*, at 1a-8a) is reported at 54 M.J. 47.

[1] "App." refers to the appendix attached to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on August 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (1998).

CONSTITUTIONAL PROVISIONS, STATUTES AND EXECUTIVE ORDER INVOLVED

Reprinted in the Appendix (App., *infra*, 16a-27a) to this petition are the pertinent provisions to the following: U.S. CONST. art. II, § 2, cl. 1 and Art. I, § 8, cl. 14, and the pertinent provisions of Article 95, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 818, 856, 895 (1996)[2] and Executive Order 13,086, 63 Fed. Reg. 30,065, 30,086 (1998).

STATEMENT

I. Introduction

In the past century there has been little debate over the power of the President, in his role as Commander-in-Chief, to discipline members of the military.[3] In 1897, this Court affirmed the fundamental principle that "the power to command depends upon discipline, and discipline depends upon the power to punish." *Swaim v. United States*, 28 Ct. Cl. 173, 221-222 (1893), *aff'd*, 165 U.S. 553, 566 (1897). Today, this power to punish and ultimately to command the military, has been seriously undermined by the recent decisions of the United States Court of Appeals for the

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[2] All further citations will be to the UCMJ articles codified in the 1996 version of Chapter 47, Title 10 of the United States Code.

[3] It was well established in the last century that the civil courts had no power to interfere with courts-martial and that court-martial decisions were not subject to civil court review. *See Dynes v. Hoover*, 61 U.S. (20 How) 65 (1858).

Armed Forces and the Navy-Marine Corps Court of Criminal Appeals in Petitioner's case.

Before both military appellate courts, Petitioner argued that the President, through the signing of an executive order, prohibited Petitioner's punishment under a newly enacted provision of Article 95(2), UCMJ, 10 U.SC. § 895(2).[4] Petitioner maintained that the President, through his delegated and inherent authority, had, in the absence of Congressional language to the contrary, implemented an effective date of Congress' changes to this provision of the UCMJ until those changes could be integrated into the military's Manual for Courts-Martial [hereinafter "MCM"].

Despite the President's order, both courts below affirmed Petitioner's conviction and punishment, with the Court of Appeals for the Armed Forces stating that "Congress [did not] delegate to the President the power to state an effective date," and suggested that such a power does not even exist. App., *infra*, at 8a. These rulings not only overstep the lower courts' Article I authority,[5] but also undermine the President's ability, in his role as Commander-in-Chief, to punish, *or not punish*, those who serve under his command. More importantly, these decisions violate the separation-of-powers doctrine in that they unconstitutionally interfere with the President's lawful authority under Article II, Section 2, Clause 1, of the Constitution.

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[4] Unless otherwise stated, all further citations will only be to the UCMJ articles, as codified in the 1996 changes to Chapter 47, Title 10 of the United States Code.

[5] Military courts are not Article III courts but agencies established pursuant to Article I. Judges of Article I courts do not have the independence conferred by security of tenure and of compensation. *See Kurtz v. Moffitt*, 115 U.S. 487 (1885).

In 1893, in a landmark decision defining Presidential authority over the armed forces, the *Swaim* Court explained this critical separation-of-powers issue. In doing so, the Court struck a fundamental chord in American Constitutional jurisprudence, stating:

> If the President has no authority in matters pertaining to military tribunals unless it be 'expressly' granted by Congress, then Congress... could practically defeat the express declaration of the Constitution and strip the office of Commander-in-Chief of all real powers of command.

Swaim, 28 Ct. C1. at 221-222, *aff'd*, 165 U.S. at 566.

Today, this same reasoning applies with equal force. If the lower courts are correct and the President has no inherent power over military punishments, the impact would be to impermissibly limit the exercise of the President's Article II functions. This limitation by another co-equal branch of the government is at the heart of the separation of powers doctrine and should not be condoned by this Court. This Court is now faced with the same evil identified and corrected by the *Swaim* Court over a century ago.

II. The Underlying Facts and Proceedings

The facts in this case are not in dispute. On October 29, 1997, Petitioner broke into another sailor's car to steal his stereo equipment, and in the process set off the car's alarm. At the same time, two base detectives drove by in an unmarked truck. Fearing apprehension, Petitioner left the scene in his own vehicle. At some point, Petitioner saw that the truck following him had flashing lights and believed it to be Naval Station security. Petitioner surrendered to authorities after a short chase. Other than

fleeing the scene, Petitioner did nothing else to resist arrest. App., *infra*, at 3a-6a.

On March 6, 1998, Petitioner pled guilty at a general court-martial to flight from apprehension and three specifications of larceny, in violation of Articles 95 and 121 of the UCMJ. A military judge sentenced him to a bad-conduct discharge, 13 months confinement, forfeiture of all pay and allowances, and reduction to the lowest enlisted pay-grade.

Petitioner appealed his conviction to the Navy-Marine Corps Court of Criminal Appeals and argued that his plea to violating Article 95, by fleeing apprehension was not legally sufficient. App., *infra*, at 11a. In support, Petitioner cited a long line of cases holding that flight from apprehension alone does not constitute resisting arrest[6] and that the amendment to Article 95, which made fleeing to avoid apprehension an offense,[7] did not apply to acts occurring before June 26, 1998. App., *infra*, at 11a.

In support of this position, Petitioner relied upon the specific language of Exec. Order 13,086, which implemented the Congressional amendments to the UCMJ. The Order clearly stated that "[n]othing contained in these amendments shall be construed to make punishable any act done or omitted prior to June 26, 1998. . ." App., *infra*, at 27a. It is undisputed that Petitioner's acts occurred on October 29, 1997.

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[6] *See United States v. Thomasson*, 50 M.J. 179 (1999); *United States v. Burgess*, 32 M.J. 446 (C.M.A. 1991); United *States v. Harris*, 29 M.J. 169 (C.M.A. 1989); *United States v. Jones*, 34 M.J. 1229 (N.M.C.M.R. 1992).

[7] The amendment to Article 95, UCMJ, was contained in the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Title XI, § 1112, 110 Stat. 461 (1996), which the President signed into law on 10 February 1996.

In prior cases, the United States had conceded and the lower court had held, that before June 26, 1998, fleeing alone was not punishable under the UCMJ due to the President's limitation in Exec. Order 13,086. App., *infra*, at 4a. Despite these earlier concessions by the Government and decisions by the lower court, in Petitioner's case, the Government asserted that fleeing from apprehension actually became punishable on February 10, 1996, the date the statute was amended by Congress and not the date the President indicated in his executive order. App., *infra*, at 12a.

In Petitioner's case, both lower courts agreed with the Government's new position and the Court of Appeals for the Armed Forces held that "Congress [did not] delegate to the President the power to state an effective date" and that, more importantly, that the President did not have the inherent authority to make such a limitation. App., *infra*, at 7a.

REASONS FOR GRANTING THE PETITION

A grant of certiorari is necessary to answer the fundamental questions presented by this case. Is a specific authorization from Congress the sole authority for the President to act and establish binding and determinate sentencing and punishment standards for criminal court-martial cases? Or does the President have the inherent authority to prescribe limitations on the punishment for members of the military? Given the critical role punishment plays in the administration of discipline and command, it is not an overstatement to say that this question is one of the most important questions regarding the appropriate exercise of Presidential power over the military to come before this Court in the last century.

This inherent power of the President is not new. Over a century ago, Congress initiated the practice of directing the President, rather than the court-martial itself, to fix the maximum allowable punishment whenever the Articles of War left the sentence to the discretion of the court-martial. *See* Act of Sept. 27, 1890, ch. 998, 26 Stat. 491. In urging the legislation's enactment, the Committee added:

> In such offenses the committee believes that there should be some common standard, and think it very fit that the Commander-in-Chief should have the power to prescribe the limit.

In 1950, Congress enacted the Uniform Code of Military Justice, and in doing so the practice of allowing the President to determine penalties and set limits on punishment was codified and continued. *See* Pub. L. No. 81-506, 64 Stat. 108 (1950). Even more recently, in affirming the death penalty sentence of Private Dwight J. Loving, and preserving the fundamental power of the President, in his role as Commander-in-Chief, to regulate court-martial punishments, this Court stated:

> '[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian' and the President can be entrusted to determine what limitations and conditions on punishments are best suited to preserve that special discipline.

United States v. Loving, 517 U.S. 748, 772 (1996) (citations omitted).

Although the Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces" it does not grant Congress an exclusive,

nondelegable power to determine military punishments. U.S. CONST., art. I, § 8, cl. 14. Instead, it gives Congress the flexibility to exercise or share power with the Executive branch as the times might demand. *Id.* at 778 ("by virtue of his constitutional role as Commander-in-Chief, *see* U.S. CONST, art. II, § 2, cl. 1, [the President] possesses shared authority over military discipline [with Congress]."). *Loving*, 517 U.S. at 778. As this Court made clear, "it would be contrary to the respect owed the President as Commander-in-Chief to hold that he may not be given wide discretion and authority" to determine punishments in military justice system. *Id.* at 768.

Despite these historical foundations and constitutional underpinnings, both courts below held that the President does not have the power even simply to suspend punishment through the promulgation of the Manual for Courts-Martial absent specific authorization from Congress. This effectively abolishes the President's power to determine punishments as recognized by this Court in *Loving*, and undermines his constitutional role as Commander-in-Chief. This ruling also raises several questions that only this Court can answer. Can the President act in matters of military justice, without specific legislation from Congress? Should the Commander-in-Chief be empowered to determine matters of military discipline, even absent a specific congressional authorization? Can the President act to suspend punishment, even for a limited period, after Congress creates an offense? Does the President's inherent power to regulate punishment, as recognized by this Court in *Loving*, operate in the face of congressional silence?

I. Review is Warranted in this Case to Ensure that the Legislative Branch of the Government Does not Unconstitutionally Interfere with the Historically Recognized Power of the President To Punish Members of the Military.

A threshold matter in this case is whether the President has the authority to act in matters of military justice apart from the statutory authority granted him by Congress. Before the courts below decided Petitioner's case, this Court had indicated that such independent power did exist. *Loving*, 517 U.S. at 772-774. In upholding the power of the President to define aggravating factors in death penalty sentencing, and the lawfulness of Congress' implicit delegation of that authority under the UCMJ, this Court stated:

> The President's duties as Commander-in-Chief, however, require him to take responsible and continuing action to superintend the military, including the courts-martial.
>
> The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'

Loving, 517 U.S. at 772 (citations omitted).

The decisions of both the courts below, holding that the President promulgation of Exec. Order 13,086 could not limit Petitioner's punishment, is not only a clearly erroneous interpretation of the provision, but more importantly, brings into question the power of the

executive branch to promulgate punishment limitations in military courts-martial. Assuming the lower military courts were correct, that the President does not have inherent authority to act in matters concerning punishment and discipline without a specific grant of Congressional authority, then it would appear that he did not have the authority (or, at minimum, it would not be a lawful delegation) to create and promulgate aggravating factors in death penalty sentencing that this Court held was appropriate in *Loving*. This conflict between this Court's jurisprudence and that of the military appellate courts of appeal should be resolved by granting review of this petition.

Furthermore, this Court should grant review to resolve this conflict between the separate branches of government, and uphold the recognized and inherent power of the President to not only "take Care that the Laws be faithfully executed," but also to perform his statutorily delegated powers as well. In *Swaim*, where this Court later concluded that the President had the inherent power to convene courts-martial in the absence of legislation expressly prohibiting him from doing so, the Court of Claims stated:

> There remains the significant fact in our military system that the President is always the Commander-in-Chief. Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force Congress cannot take away from the President the supreme command.

Swaim, 28 Ct. C1. at 221-222, *aff'd*, 165 U.S. at 566 ("We have felt constrained to, at least briefly, consider the several propositions urged upon us . . . , though we might well have contented ourselves with a reference to the able and

elaborate opinion of the Court of Claims.").

In affirming the *Swaim* decision, this Court also quoted at length from an 1835 report by the Senate Judiciary Committee. That report noted that the 1806 Articles of War, in expressly authorizing certain named officers to convene courts-martial, did not intend to:

> exclude the inherent power residing in the President of the United States under the Constitution. * * * [and that those articles] do not in any manner control or restrain the commander-in-chief of the army from exercising the power which the committee think, in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised.

Swaim, 165 U.S. at 557-558. Taken together, these cases make clear that the President, even in the absence of a specific Congressional grant of authority, does have inherent powers to act in matter of military discipline and that his action in Petitioner's case to declare a specific date for punishment, in the face of congressional silence, was appropriate.

II. Review is Warranted because Congress Clearly Delegated to the President the Power to Determine Punishments in Courts-Martial, and the Decisions of the Lower Courts Effectively Undermine the Constitutionally Permissible Exercise of the President's Discretion.

Congress unquestionably has the authority to make rules for the "[r]egulation of the land and naval Forces." U.S. CONST., Art. I, § 8, cl. 14. This is not to say, however, that Congress cannot delegate these powers. In

this regard, this Court has recognized that in an "increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *See Mistretta v. United States*, 488 U.S. 361, 372 (1989).

Consistent with its delegation authority, Congress gave the President broad authority in the regulation and punishment of military members. *See United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105, 118 (C.M.A. 1962); *see also* Article 36, UCMJ, 10 U.S.C. § 836 (1998). This wide reaching power was recently reaffirmed by this Court in *United States v. Scheffer*, 523 U.S. 303, 317 (1998).

Additionally, the Court of Military Appeals, in the death penalty appeal of Lance Corporal Ronnie A. Curtis, concluded that, under the UCMJ, the President has long "play[ed] the major role in determining what punishments may be imposed by courts-martial." *United States v. Curtis*, 32 M.J. 252, 261 (C.M.A. 1991). It held that several provisions of the UCMJ, particularly Articles 18, 36, and 56, authorized the President to promulgate aggravating factors for capital cases. *Curtis*, 32 M.J. at 261. Relying on *Mistretta*, the *Curtis* Court rejected a separation-of-powers challenge to this delegation, noting that "in view of [the President's] inherent constitutional authority [as Commander-in-Chief of the Army and Navy], a separation-of-powers objection has much less merit in the present context than if the 'aggravating factors' for capital cases tried by courts-martial had been formulated by a specially created commission." *Id.* at 260.

Taken together, these statutes (Articles 18, 36 and 56) make clear that Congress has wholly delegated to the President the power to determine what, or when,

punishments may, or may not be, imposed by courts-martial. In this regard, instead of legislating maximum punishments as it has done in Title 18 of the United States Code for cases tried in the District Courts, Congress has decided that the President shall set the maximum punishments and control when such punishments are imposable in trials by courts-martial. Therefore, when the President issues an executive order to implement changes to the MCM, it is clear he does so pursuant to his inherent Constitutional and lawfully delegated authority.[8]

Consistent with this delegated power, the President has, through executive orders, prescribed rules relating to pretrial, trial and post-trial procedures for courts-martial and has set the maximum punishments that a court-martial may impose. When exercising this power, the President can afford greater protections to servicemembers, absent direct legislation to the contrary. *United States v. McGraner*, 13 M.J. 408, 414 (C.M.A. 1982) ("[E]ither the President in promulgating the Manual for Courts-Martial or the Armed Services by adopting regulations can go even further than the Constitution and the Uniform Code in providing safeguards for military personnel."). This analysis creates a hierarchy of rights. Under this hierarchy,

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[8] To hold otherwise, as the lower court's opinion implicates, undermines the President's authority to even implement any portion of the UCMJ. As this Court stated in *Whalen v. United States*, 445 U.S. 684 (1980):

> Within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress.

Id. at 689; *see also United States v. Evans*, 333 U.S. 483 (1948) ("Defining crimes and fixing penalties are legislative not judicial functions.").

when the President clearly gives an accused greater rights, than that conveyed by another source, courts must abide by that decision. *United States v. Davis*, 47 M.J. 484, 486 (1998); *cf. United States v. Caceres*, 440 U.S. 741, 754 (1979) (exclusion not necessary if tainted evidence was obtained in violation of an executive department's rule concerning electronic eavesdropping, however, such regulations can confer additional rights.).

As discussed *infra*, on May 28, 1998, the President promulgated the 1998 Amendments to the MCM. App., *infra*, at 16a-25a. In doing so, he made changes to, among other paragraphs, Part IV, ¶ 19 (Article 95) of the MCM. More specifically, the President restated the entire old statute of Article 95 and added the new language from the congressional amendment concerning the offense of fleeing apprehension. App., *infra*, at 17a. The President's amendment and the new language made fleeing apprehension punishable under the UCMJ. In this same section of his executive order, the President outlined the new elements, explanations for the offense and authorized the maximum punishment for the offense as a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year. App., *infra*, at 16a-25a.

Because Petitioner committed this offense one year before the President's executive order made it punishable, he could not have been prosecuted for his actions. In analyzing the simple language of the Exec. Order 13,086, the lower court simply examined whether the congressional statute creating the offense was effective before, or after, 1997. Under this framework, the lower court held that even though "[t]he legislation that amends Article 95 of the Code contained no effective date [it necessarily] took effect on February 10, 1996, the day the President signed the legislation." App., *infra*, at 25a.

Therefore, citing to this Court's decision in *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991), the lower court held that the effective date of the statute was the date of its enactment, and not the date the President authorized its punishment. App., *infra*, at 7a.

The lower court's holding rendered the limitation and effective date provisions in the President's executive order meaningless. This violates the canon of statutory interpretation that a court is "not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. . . . [a] statute ought, upon the whole, to be so construed that, if it can be prevented, no cl., sentence, or word shall be superfluous, void, or insignificant." *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) (internal quotation omitted); *see also Miller v. French*, 120 S. Ct. 2246, 2253 (2000); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994).

At the center of the misunderstanding by both lower courts was the way in which each court analyzed the process by which the President's executive orders were promulgated. Generally speaking, and in Petitioner's case, when the President implements changes or amendments to the MCM, the President does so through the promulgation of a new executive order. In any amendment, the President also repeats all the existing provisions.[9] In 1998, when the

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[9] The language at issue is contained in some form in all executive orders promulgating changes to the MCM. In fact, this Court and some military courts have interpreted similar provisions in executive orders implementing changes to the UCMJ, as being consistent with Petitioner's argument in this Petition. *Cf. Gusik v. Schilder*, 340 U.S. 128 (1950) (discussing Congressional action and the President's promulgation of an effective date for implementing changes to the Articles of War); *United States v. Edwards*, 42 C.M.R. 374 (A.C.M.R. 1970) (applying changes to the MCM as effective on the date the

new provision of Article 95(2) was added, the President also *restated* all the existing sections of Article 95 as well. Therefore, in section 4 of this executive order, the President also stated, that the "amendments shall take effect on May 27, 1998," subject only to one limitation: "[that] [n]othing contained in these amendments shall be construed to make punishable any act done or omitted prior to June 26, 1998, *which was not punishable when done or omitted*." App., *infra*, at 25a (Emphasis added). In other words, those provisions that were simply re-promulgated, or restated, by the executive order amending the MCM, *would still be punishable* as they were prior to the executive order, but that anything new, such as Article 95(2), was not to be punished until June 26, 1998. *Id.*[10]

Under the analysis of both lower courts, if all military offenses were punishable when enacted (i.e., when Congress gives no specific effective date), then there would be no offense, passed by Congress and later implemented by the President, that would ever be "made punishable" by the President's amendments to the MCM. Such an interpretation is inconsistent with the expressed language and intent of Executive Order 13,806, and, as stated *infra*,

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President specifies in his executive order.).

[10] In *United States v. Merritt*, 1 C.M.R. 56, 60 (C.M.A. 1951), one of the first cases to address a related issue, and also to interpret the meaning and effect of the President's language in an executive order, the Court of Military Review, stated:

> Congress saw fit to delegate to the President the right to set up the procedure in military courts and tribunals. It must have been realized that implementing acts would be necessary to fill in the interstices and that it would be undesirable for Congress to deal with the many details. For it to have done so would have rendered the system rigid and inflexible.

Id., at 61.

with normal canons of statutory construction. *See Washington Market Co.*, 101 U.S. at 115-16; *see also* 2 N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 46.06 (C. Sands 5th rev. ed. 1994) (It is a well-established principle of interpretation that condemning statutory language to the rubbish heap of surplusage should be avoided.).

In addition, Congress did not state any contrary intent to the President's limitation in Exec. Order 13,086. Neither the language of the statute, nor the legislative history, makes clear whether Congress intended that Article 95 be punishable before, or after, Presidential action. In fact, a *contrary* interpretation is evident in the statute. The National Defense Authorization Act for Fiscal Year 1996, which amended and added Article 95(2) to the UCMJ, did not contain a specific effective date for this provision, but it did contain specific effective dates for several of its other sections. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Title XI, § 1112, 110 Stat. 461 (1996) (In Title XI, Subtitle B, Sec. 1121, the amendment's applicability was specifically noted as 30 days after the enactment of the Act; Title XI, Subtitle B, Sec. 1122, the amendment's applicability was specifically noted as 30 days after the enactment of the Act; Title XI, Subtitle C, Sec. 1133, the amendment's effective date was specifically noted as six months after enactment.).

Congress' ability to draft specific effective dates in matters concerning military justice when it so chooses is also evident in several other prior acts of Congress. *Compare* 10 U.S.C. § 906a (1998), Pub. L. 99-145, Title V, § 534(a), Nov. 8, 1985, 99 Stat. 634 (Congress states no effective date for the implementation of the amendment to the UCMJ establishing Article 106a), *and* Executive Order

12,550, Section 4 (where the President adds Article 106a to the Manual and provides an effective date of March 1, 1986, some four months after Congress enacted the statute authorizing the action.), *with* 10 U.S.C. § 911a (1998), Pub. L. 98-206, § Dec. 6, 1983, 97 Stat. 1403 (Congress provides for a specific effective date), *and* Executive Order 12,473, Section 4 (where President provides same effective date).

Thus, Congress' silence as to the effective date of some provisions and its specific mandate in other provisions, manifests an intent, or at least no contrary intent, to delegate to the President the power to determine a specific effective date. Given Congress' demonstrated ability to draft statutory language imposing effective punishment dates,[11] its failure to use such language in the amendment to Article 95 cannot be ignored in favor what the lower court contends Congress must necessarily have meant. *See, e.g., Gozlon-Peretz*, 498 U.S. at 395 (1991), *quoting Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotation

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[11] The following citations also illustrate how Congress has provided for effective dates to various punitive articles. *See* 10 U.S.C. § 911 (1998) (which states in the Historical and Statutory Notes following the Code provision: "Effective Dates - 1993 Acts. Section 576(b) of Pub. L. 103-160 provided that: The amendments made by subsection 9 (a) [amending par. (2) of this section] shall take effect as if included in the amendment to section 911 of Title 10, United States Code [this section], made by section 1066(a)(1) of Public Law 102-484 on October 23, 1992."); *see also* 10 U.S.C § 803 (1998) (which states in the Historical and Statutory Notes following the Code provision: "Effective dates - 1992 Acts. Section 1067 of Pub. L. 102-484 provided that: The amendments made by sections . . . 1066 [amending sections 911, 918 and 920 of this title] shall take effect on the date of the enactment of this Act [Oct. 23, 1992] and shall apply with respect to offenses committed on or after that date.").

marks omitted); *see also General Motors Corp. v. United States*, 496 U.S. 530, 541 (1990) ("The fact that Congress explicitly enacted an enforcement bar similar to the one proposed by petitioner in one section of the statute, but failed to do so in the section at issue in this case reinforces our refusal to import such a bar here.").

Furthermore, this Court has long held that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Wiltberger v. United States*, 18 U.S. (5 Wheat) 76, 95 (1820). "Where text, structure, and history fail to establish that the Government's position is unambiguously correct -- we apply the rule of lenity and resolve the ambiguity" in favor of the individual, *United States v. Granderson*, 511 U.S. 39, 53 (1994); *cf. United States v. Landgraf*, 511 U.S. 244 (1994) (holding that where a statute does not contain an express effective date, courts must determine whether the statute would "increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If it does, courts should not apply the statutes to pending cases."); *see also* 2 N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 59.03, at 102 (It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government."). Thus, even assuming there is some ambiguity in Congress' enactment, the rule of lenity requires that the statute be construed in favor of Petitioner.

This rule is rooted in "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (*quoting* H. Friendly, Benchmarks 209 (1967)). Surely, the distaste for an individual being sentenced in derogation of a Presidential mandate, without a clear

Congressional statement to the contrary, is just as strong. In this case, because Congress was silent as it relates to the punishment authorized for Article 95, the President's promulgation of the amendments to the MCM which sets a date the punishment would go into effect, is not inconsistent with the statute, or with Congress' expressed or implied intent. The rule of lenity requires a finding that the President's protections and limitation be given effect.

Furthermore, not only does Article 36, when read in conjunction Articles 18 and 56, give the President the power to determine a statute's effective date, the modes of proof prior to trial, and to set the maximum punishment therein, but the plain language of Article 95, as amended by Congress, delegates this same power. Article 95, as amended by Congress, states: "[a]ny person subject to this chapter . . . shall be punished as a court-martial may direct." 10 U.S.C. § 895(4). The President, in his role as Commander-in-Chief and under the powers delegated him by Congress, has the power to determine how a court-martial may punish or when a court-martial may punish. *See Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) ("The Executive has the power (whether or not it has the right) effectively to nullify some provisions of law by the mere failure to prosecute -- the exercise of so-called prosecutorial discretion. And it has the power (whether or not it has the right) to avoid application of § 3501 by simply declining to introduce into evidence confessions admissible under its terms."); *cf. United States v. Dickerson*, ___ U.S. ___, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

It is also without dispute that the Constitution of the United States vests in the President the power to pardon members of the armed services as well as citizens of the United States. U.S. CONST. art. II, § 2, cl. 1; *see also Ex*

parte Garland, 71 U.S. 333 (1867) (holding that except in cases of impeachment, President's power to grant pardons is unlimited).

Under this analysis, it is arguable that the President may also has the power to suspend indefinitely the punishment of any article, if desired. As this Court, in the historic case of *Ex Parte Garland*, stated:

> The power thus conferred is unlimited . . . [i]t extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

Id. at 371.

Therefore, even if Congress intended to make February 10, 1996, the effective punishment date of Article 95, no punishment could be imposed because of the President's mandate in his amendment to the MCM. The authority to make such a mandate is found, not only in his powers as Commander-in-Chief, but also his Pardon power under the Constitution. Coupled together, notwithstanding the decisions of the courts below, it is clear the President has the inherent authority to limit punishment in matters of military justice.

In this case, the President clearly ordered that punishment for fleeing apprehension could not be imposed

by courts-martial for crimes occurring before June 26, 1998. Petitioner's conviction for acts occurring in 1997 and his subsequent punishment violated this mandate. Allowing the lower court's decision to stand will undermine the President's ability, as Commander-in-Chief, to punish, or *not punish*, those who serve under his command. This is critical function of the executive, because it has been historically recognized that the power to command depends upon the power to discipline, and discipline depends upon the power to punish. Without such power, the President cannot effectively implement the UCMJ, and ultimately cannot maintain the good order and discipline required in our military forces.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 2000

APPENDIX

UNITED STATES, Appellee

v.

Aaron P. PRITT, Radioman Seaman
U.S. Navy, Appellant

No. 99-0912

Crim. App. No. 98-1660

United States Court of Appeals for the Armed Forces

Argued February 3, 2000

Decided on August 31, 2000

SULLIVAN, J., delivered the opinion of the Court, in which CRAWFORD, C.J., GIERKE, and EFFRON, JJ., and COX, S.J., joined.

Counsel:

For Appellant: Lieutenant Omar R. Lopez, JAGC, USNR (argued).

For Appellee: Lieutenant William C. Minick, JAGC, USNR (argued); Colonel Kevin M. Sandkuhler, USMC, and Commander Eugene E. Irvin, JAGC, USN (on brief).

Military Judge: Daniel J. D'Alesio, Jr.

Judge SULLIVAN delivered the opinion of the Court.

On March 6, 1998, appellant was tried by a general court-martial composed of a military judge sitting alone at the Naval Legal Service Office, Mayport, Florida. Pursuant to his pleas, he was found guilty of flight from apprehension and three specifications of larceny, in violation of Articles 95 and 121, Uniform Code of Military Justice, 10 USC §§ 895 and 921, respectively. He was sentenced to a bad-conduct discharge, confinement for 13 months, total forfeitures, and reduction to E-1. On August 28, 1998, the convening authority approved the sentence as adjudged except that he suspended all confinement in excess of 12 months and made provision for payment of forfeitures to appellant's wife until 6 months from the date of the action. On June 25, 1999, the United States Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. *United States v. Pritt*, 52 M.J. 546 (N.M.Ct.Crim.App. 1999).

On October 22, 1999, we granted review of the following issue:

> WHETHER THE LOWER COURT ERRED IN FINDING THAT THE EFFECTIVE DATE OF THE AMENDMENT TO ARTICLE 95, UCMJ., WAS FEBRUARY 10, 1996, WHEN THE PRESIDENT'S EXPRESS DIRECTION IN EXECUTIVE ORDER 13086, WHICH MADE THE OFFENSE OF FLEEING APPREHENSION PUNISHABLE, SPECIFICALLY STATES THAT "NOTHING CONTAINED IN THESE AMENDMENTS SHALL BE CONSTRUED TO MAKE PUNISHABLE ANY ACT DONE OR OMITTED PRIOR TO JUNE 26, 1998, WHICH WAS NOT PUNISHABLE WHEN DONE OR OMITTED."

We hold that the lower court did not err in concluding that the effective date of the amendment to Article 95 of the Uniform Code of Military Justice was February 10, 1996, the date of its enactment. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); *see generally United States v. Gonzalez*, 42 M.J. 469, 474 (1995); *see also United States v. Poole*, 47 M.J. 17, 18 n.* (1997). Additionally, Executive Order No. 13,086 does not prohibit prosecution of appellant's conduct which occurred on October 29, 1997, under this amended statute.

Appellant, a 21-year-old sailor with 2 years of active service was assigned to the USS SAMUEL ELIOT MORISON (FFG 13) at Mayport, Florida. Pursuant to his pleas, he admitted that in October of 1997, he broke into the automobile of three other sailors and stole various items, such as speakers, tape players, a radar detector, a compact disc changer, and compact discs. He also admitted that on October 29, 1997, he was discovered by the police while engaging in these criminal acts and attempted to avoid arrest by fleeing.

Prosecution Exhibit 1, a stipulation of fact, says in pertinent part:

> 9. On or about 29 October 1997, while breaking into Gunner's Mate First Class [GM1] Edgar Bartley's vehicle in the Fire Station Parking lot of Naval Station, Mayport, the accused set off the car alarm. MA2 Richard Howard and MA3 Kevin Jimenez, Naval Station Mayport base detectives, were driving in the area of the Naval Station Mayport Fire Station when they saw the headlights flashing on GM1 Bartley's vehicle. As the detectives pulled closer to GM1 Bartley's vehicle, they noticed another car next to it. The detectives then turned on their emergency lights. The accused saw the base security vehicle coming towards him. The accused then ran, and entered his vehicle. The accused exited the fire station parking lot and drove very rapidly toward the main gate. The accused saw the emergency lights of the base security vehicle flashing

behind him. As the security vehicle pulled closer to him, the accused accelerated in an attempt to avoid apprehension by the base detectives. A high speed police pursuit then ensued down Main Street, Naval Station, Mayport, Florida. When the accused entered the intersection of Massey Avenue and Main Street, the traffic light in the left-hand lane was red with cars stopped in front of him. In an attempt to avoid stopping for the red light and being apprehended, the accused, traveling approximately 40 to 50 miles per hour, swerved into the lane of oncoming traffic causing traffic in that lane to swerve off of the road to avoid being hit by the accused. The accused then proceeded to travel at speeds reaching approximately 70 miles per hour toward the Naval Station Mayport, Florida main gate. When almost at the main gate, the accused observed another base security vehicle at the gate about to join the chase. The accused knew and understood that he could not avoid police apprehension, and decided to stop his vehicle and surrender.

10. The accused believed and understood that he was being pursued for apprehension by the base detectives because of his action of breaking into the automobile of Gunner's Mate First Class Edgar Bartley. The accused also knew and understood that he was being pursued for apprehension by the base detectives because of his reckless high speed driving while on Main Street, Naval Station, Mayport, Florida. The accused believed and understood that the base detectives were pursuing him to stop his vehicle and place him into physical custody because of [sic] he broke into the automobile of GM1 Bartley. The accused believed and understood that the base detectives were pursuing him to stop his vehicle and place him into physical custody because he was also driving recklessly and at high speeds on Main Street, Naval Station, Mayport, Florida.

> 11. The accused knew that the vehicle chasing him was a law enforcement vehicle driven by law enforcement officers because he saw the flashing emergency lights and it was clearly identifiable as a law enforcement vehicle. The accused further knew and understood that the law enforcement officers pursuing him had the authority and power to apprehend him.
>
> 12. The accused freely admits that his conduct was wrong, and that he had no legal excuse or justification for his illegal activities.

The military judge at appellant's court-martial approved his request for a trial by judge alone. He then explained what occurred during a conference held pursuant to RCM 802, Manual for Courts-Martial, United States (1998 ed.):

> We discussed the fact that what is being charged under Charge I is fleeing apprehension, which is a change to Article 95 of the UCMJ.. It changed in 1996 some time. It is applicable to Article 95 offenses that would have taken place at the time alleged in this charge sheet, and as such the only issue was what would be the maximum punishment if the accused was found guilty for that. We have determined the maximum punishment is a DD and one year for that particular offense, for the fleeing apprehension offense. I'm sorry, a bad-conduct discharge and one year, not a DD, a bad-conduct discharge and one year confinement for that offense. Since the current 1995 Manual for Courts-Martial bound edition does not have that, we had to look it up from other sources.

(R. 11-12.) He then secured both counsel's agreement that that was "the extent of the 802 conference." (R. 12.)

Article 95 of the Uniform Code of Military Justice, prior to 1996, stated:

> **Resistance, breach of arrest, and escape**

> Any person subject to this chapter who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct.

As amended in 1996 it now states:

> **Resistance, flight, breach of arrest, and escape**
>
> Any person subject to this chapter who–
>
> (1) resists apprehension;
> (2) *flees from apprehension;*
> (3) breaks arrest; or
> (4) escapes from custody or confinement; shall be punished as a court-martial may direct.

(Emphasis added.)

The 1996 amendment of Article 95 of the Code was part of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Title XI, § 1112, 110 Stat. 461 (1996); *see also* H.R.Conf.Rep. No. 450, 104th Cong., 2d Sess. at 852 (1996), *reprinted in* 1996 U.S.C.C.A.N. 378. It was signed into law by the President on February 10, 1996. 110 Stat. 703 (1996). This legislation contained no language indicating an effective date for the particular amendment to Article 95 of the Code.

On May 27, 1998, the President signed Executive Order No. 13,086, 63 Fed. Reg. 30,065, 30,086 (1998), *reprinted in* Manual, *supra* at A25-36 through A25-52, amending the Manual for Courts-Martial to reflect, among other things, the amendments to the Code contained in the National Defense Authorization Act for Fiscal Year 1996. Executive Order No. 13,086 provides that the amendments to the Manual "shall take effect on May 27, 1998," and then states in pertinent part: "Nothing contained in these amendments shall be construed to

make punishable any act done or omitted prior to June 26, 1998, which was not punishable when done or omitted."

Appellant claims that the effective date of the amended Article 95 of the Code was June 26, 1998, as provided by the President in Executive Order No. 13,086, which amended provisions in the Manual for Courts-Martial. He bases his argument on the lack of a specified effective date in the legislation amending Article 95 of the Code, the President's statement in Executive Order No. 13,086, and *United States v. McCurry*, No. 97-1809 (N.M.Ct.Crim.App. December 4, 1998)(unpublished).* Appellant asserts that Congress delegated to the President the power to state an effective date and the President chose June 26, 1998, as the effective date. We disagree with appellant's argument.

The Supreme Court has said: "It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment." *Gozlon-Peretz v. United States*, 498 U.S. at 404. The legislation that amends Article 95 of the Code contained no effective date; therefore, it took effect on February 10, 1996, the day the President signed the legislation. *See generally 2 Sutherland on Statutory Construction* § 33.06 at 12 (C. Sands 4th rev. ed. 1986).

We must next turn to the effect of Executive Order No. 13,086 on the prosecution of appellant's offense. We have continually reiterated that the Uniform Code of Military Justice controls when an executive order conflicts with part of that Code. *See generally United States v. Gonzalez*, 42 M.J. 469, 474

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*The Court of Criminal Appeals said: "Although Article 95, UCMJ., 10 USC § 895, has been amended so that it now makes flight from apprehension a criminal offense, the amended article does not apply to acts occurring prior to 26 June 1998. In this case, the appellant took flight from apprehension on 13 May 1997. Thus, we set aside the finding of guilty to resisting apprehension, and dismiss Charge IV and its single specification." Unpub. op. at 2.

(1995); *United States v. Mance*, 26 M.J. 244, 252 (1988). Here, however, we do not believe that there is any conflict between Executive Order No. 13,086 and the amended Article 95 of the Code. While the President can provide safeguards to servicemembers that go beyond the Constitution and the Code, *see, e.g., United States v. Manuel*, 43 M.J. 282, 286 (1995), we do not construe Executive Order No. 13,086 as doing so. It simply does not grant appellant any additional rights with respect to delayed application of the above-noted amendment to Article 95 of the Code. *Compare United States v. Davis*, 47 M.J. 484, 486 (1998), *with Davis*, 47 M.J. at 488 (Sullivan, J., dissenting).

On its face, Executive Order No. 13,086 allows for the punishment of appellant's conduct. The language at issue in the Executive Order actually states "Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to June 26, 1998, *which was not punishable when done or omitted.*" (Emphasis added.) However, as noted above, Article 95, a provision of the Uniform Code of Military Justice and the United States Code, was previously amended in 1996 and made punishable, at that time, flight from apprehension. Accordingly, under this congressional statute, appellant's conduct was clearly "punishable when done" in 1997 and its prosecution was not abrogated by this Manual provision.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

APPENDIX

UNITED STATES v. Aaron P. PRITT, 366-88-0485
Radioman Seaman (E-3), U.S. Naval Reserve

NMCM 98 01660

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

52 M.J. 546; 1999 CCA LEXIS 177

June 25, 1999, Decided

COUNSEL: LT OMAR R. LOPEZ, JAGC, USNR, Appellate Defense Counsel.

LCDR JOANN W. MELESKY, JAGC, USN, Appellate Government Counsel.

Maj KEVIN M. FITZWATER, USMCR, Appellate Government Counsel.

JUDGES: BEFORE K.T. SEFTON, R.H. TROIDL, JOHN W. ROLPH. Chief Judge SEFTON and Judge ROLPH concur.

OPINION: TROIDL, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of fleeing apprehension and three specifications of larceny, in violation of Articles 95 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 895 and 921 (1994). The adjudged sentence includes a bad-conduct discharge, 13 months confinement, total forfeitures, and reduction to the lowest enlisted pay grade. The convening authority

approved the sentence as adjudged, but suspended all confinement in excess of 12 months pursuant to the terms of a pretrial agreement. The convening authority granted the appellant clemency as to both the adjudged and automatic forfeitures.

We have carefully reviewed the record of trial, the appellant's assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Fleeing Apprehension

In his first assignment of error, the appellant argues that his plea to violating Article 95, UCMJ, by fleeing to avoid apprehension was improvident. In support of his position, he cites a long line of cases to the effect that flight alone does not constitute resisting apprehension[1] and asserts that the amendment to Article 95, UCMJ, which made fleeing to avoid apprehension an offense,[2] "does not apply to acts occurring before June 26, 1998." Appellant's Brief of 19 Feb 1999 at 3. He bases this date upon Exec. Order 13,086, 63 Fed. Reg. 30,065 (1998), which amended the Manual for Courts-Martial, and implemented the amendments to the UCMJ contained in the National Defense Authorization Act

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[1] The appellant cited United States v. Burgess, 32 M.J. 446 (C.M.A. 1991); United States v. Harris, 29 M.J. 169 (C.M.A. 1989); United States v. Jones, 34 M.J. 1229 (N.M.C.M.R. 1992); United States v. Grady, 34 M.J. 1045 (N.M.C.M.R. 1992); and United States v. McCurry, 1998 CCA LEXIS 487, No. 9701809 (N.M.Ct.Crim.App. 4 Dec 1998)(unpublished decision). Appellant's Brief of 19 Feb 1999 at 3.

[2] The amendment to Article 95, UCMJ, was contained in the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Title XI, § 1112, 110 Stat. 461 (1996), which the President signed into law on 10 February 1996.

for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 461 (1996)[hereinafter Public Law 104-106].[3]

> The Government concedes that prior to the amendment of Article 95, UCMJ, fleeing alone was insufficient to constitute the offense of resisting apprehension and in at least one earlier case before this court conceded, and this court accepted, that service members could not be charged with fleeing apprehension which occurred prior to 26 June 1998.[4] The Government now asserts that "fleeing from apprehension actually became punishable on 10 February 1996, the date the statute was amended." Government's Answer of 21 Apr 1999 at 5.

This issue was apparently discussed by the military judge and counsel during a conference held in accordance with RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.). In explaining for the record what occurred during that conference, which explanation was agreed to by both counsel, the military judge stated that:

> We discussed the fact that what is being charged under Charge I is fleeing apprehension, which is a change to Article 95 of the UCMJ. It changed in 1996 some time. It is applicable to Article 95 offenses that would have taken place at the time alleged in this charge sheet, and as such the only issue was what would be the maximum punishment if the accused was found guilty for that. We have determined the maximum punishment is a DD and one year for that particular offense, for the fleeing

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[3] Exec. Order 13,086, 63 Fed. Reg. 30,065 (1998), reads, in pertinent part, as follows: "Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to June 26, 1998, which was not punishable when done or omitted."

[4] McCurry, unpub. op. at 2.

> apprehension offense. I'm sorry, a bad conduct discharge and one year not a DD, a bad conduct discharge and one year confinement for that offense. Since the current 1995 Manual for Courts-Martial bound edition does not have that, we had to look it up from other sources.

Record at 11-12.

Although the military judge did not identify the "other sources" he consulted, one likely source was the Military Judge's Benchbook, Dept. of the Army Pamphlet 27-9 at 750-51 (30 Sep 1996), given that the military judge's statement of the maximum punishment and his explanation of both the elements of the offense and the applicable definition mirror the language contained in that publication. Record at 11-12 and 44-45; Benchbook at 253-54.[5]

> The legislation that amended Article 95, UCMJ, to explicitly include the offense of fleeing apprehension did not include any language indicating the date on which the amendment was effective or applicable. Public Law 104-106, Title XI, § 1112. [**6] The Supreme Court has noted that "it is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404, 112 L. Ed. 2d 919, 111 S. Ct. 840 (1991)(citing *Robertson v. Bradbury*, 132 U.S. 491, 493, 33 L. Ed. 405, 10 S. Ct. 158 (1889); *Arnold v. United States*, 13 U.S. 104, 9 *Cranch* 104, 119-120, 3 L. Ed. 671 (1815); 2 N. Singer,

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[5] Another possible source was R.C.M. 1003(c)(1)(B)(i), which provides in pertinent part that "for an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed. . . ." The maximum punishment listed by the military judge is quite appropriately the same as that for resisting apprehension.

SUTHERLAND ON STATUTORY CONSTRUCTION § 33.06, p. 12 (C. Sands 4th rev. ed. 1986)).

Here, we find no such contrary direction in the statutory language. Nor is there an effective date specified for Public Law 104-106 as a whole. "Congress' silence in this regard contrasts with the express effective date provisions for other discrete sections of" Title XI to Public Law 104-106. Id.; See Public Law 104-106, §§ 1121(b), 1122(b), and 1133(c). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz*, 498 U.S. at 404-05 (quoting *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983); citing *General Motors Corp. v. United States*, 496 U.S. 530, 541, 110 L. Ed. 2d 480, 110 S. Ct. 2528 (1990)).

We can discern no Congressional purpose in enacting the amendment to rebut the presumption that it became effective at once. Congress described its purpose as being to "make it clear that the offense of 'resisting apprehension' under Article 95 of the Uniform Code of Military Justice includes flight from apprehension." H. CON. REP. NO. 104-450 (1996), reprinted in 1996 U.S.C.C.A.N. 378. Given this purpose, it seems unlikely that Congress intended the effective date to be any time other than the date of enactment. Accordingly, we find that fleeing apprehension became an offense punishable as a violation of Article 95, UCMJ, after it was signed into law on 10 February 1996.

The standard of review to determine whether a plea is provident is whether the record reveals a substantial

basis in law or fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error prejudicial to the substantial right of the appellant occurs. R.C.M. 910(j); Art. 59(a), UCMJ.

In our review to consider the providence of the appellant's plea of guilty to fleeing apprehension, we determined that the military judge accurately listed the elements of this offense, properly defined the elements, and that the appellant indicated an understanding of the elements of the offense, and stated that they correctly described his actions. The appellant clearly stated in his own words just how his actions met the elements of the offense. We find no substantial basis in law and fact for questioning the appellant's guilty plea to fleeing apprehension. Moreover, we find that his plea to that offense was provident, and that no error materially prejudiced his substantial rights. The assignment of error is without merit.

Sentence Appropriateness

The appellant's other assignment of error is that his sentence is inappropriately severe. In support of his position, the appellant notes that: he was not allowed to visit his pregnant wife during 104 days of pretrial restriction; he made restitution of $ 500 to two of his three victims; he cooperated with authorities in the prosecution of a theft ring; and, he had no prior convictions or nonjudicial punishments.

We find that the sentence is appropriate in all respects for these offenses and this offender. The

record reflects that the appellant was a thief who broke into three vehicles owned by deployed Sailors. In the course of each break-in, he damaged the vehicle and then stole hundreds of dollars worth of personal property. Only after fleeing apprehension, ultimately surrendering, and being charged for these crimes, did the appellant agree to make restitution and cooperate with authorities in the investigation of a theft ring as part of a pretrial agreement limiting his punishment and causing the Government to dismiss other referred charges. We are convinced that the military judge afforded the appellant the individualized consideration to which he was entitled based on the "nature and seriousness of the offense and the character of the accused." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). In this case, we conclude that the appellant does not seek an appropriate sentence, but rather seeks clemency in addition to that already afforded to him by the convening authority. Clemency, however, is a prerogative of the convening authority, not this court. *United States v. Healy*, 26 M.J. 394, 395-396 (C.M.A. 1988). The assigned error is without merit.

Conclusion

Accordingly, we affirm the findings of guilty and sentence as approved below.

R.H. TROIDL
Chief Judge SEFTON and Judge ROLPH concur.

K.T. SEFTON

JOHN W. ROLPH

APPENDIX

[Excerpts from Executive Order 13,086,, 63 Fed. Reg. 30,065 (1998)]

Sec. 3. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

a. Paragraph 19 is amended to read as follows:

"19. Article 95-Resistance, flight, breach of arrest, and escape

a. Text.

"Any person subject to this chapter who-

(1) resists apprehension;

(2) flees from apprehension;

(3) breaks arrest; or

(4) escapes from custody or confinement shall be punished as a court-martial may direct." [*30081]

b. Elements.

(1) Resisting apprehension.

(a) That a certain person attempted to apprehend the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused actively resisted the apprehension.

(2) Flight from apprehension.

(a) That a certain person attempted to apprehend the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused fled from the apprehension.

(3) Breaking arrest.

(a) That a certain person ordered the accused into arrest;

(b) That said person was authorized to order the accused into arrest; and

(c) That the accused went beyond the limits of arrest before being released from that arrest by proper authority.

(4) Escape from custody.

(a) That a certain person apprehended the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused freed himself or herself from custody before being released by proper authority.

(5) Escape from confinement.

(a) That a certain person ordered the accused into confinement;

(b) That said person was authorized to order the accused into confinement; and

(c) That the accused freed himself or herself from confinement before being released by proper authority. [Note: If the escape was from post-trial confinement, add the following element]

(d) That the confinement was the result of a court-martial conviction.

c. Explanation.

(1) Resisting apprehension.

(a) Apprehension. Apprehension is the taking of a person into custody. See R.C.M. 302.

(b) Authority to apprehend. See R.C.M. 302(b) concerning who may apprehend. Whether the status of a person authorized that person to apprehend the accused is a question of law to be decided by the military judge. Whether the person who attempted to make an apprehension had such a status is a question of fact to be decided by the factfinder.

(c) Nature of the resistance. The resistance must be active, such as assaulting the person attempting to apprehend. Mere words of opposition, argument, or abuse, and attempts to escape from custody after the apprehension is complete, do not constitute the offense of resisting apprehension although they may constitute other offenses.

(d) Mistake. It is a defense that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so. However, the

accused's belief at the time that no basis existed for the apprehension is not a defense.

(e) Illegal apprehension. A person may not be convicted of resisting apprehension if the attempted apprehension is illegal, but may be convicted of other offenses, such as assault, depending on all the circumstances. An attempted apprehension by a person authorized to apprehend is presumed [*30082] to be legal in the absence of evidence to the contrary. Ordinarily the legality of an apprehension is a question of law to be decided by the military judge.

(2) Flight from apprehension. The flight must be active, such as running or driving away.

(3) Breaking arrest.

(a) Arrest. There are two types of arrest: pretrial arrest under Article 9 (see R.C.M. 304), and arrest under Article 15 (see paragraph 5c.(3), Part V, MCM). This article prohibits breaking any arrest.

(b) Authority to order arrest. See R.C.M. 304(b) and paragraphs 2 and 5b, Part V, MCM, concerning authority to order arrest.

(c) Nature of restraint imposed by arrest. In arrest, the restraint is moral restraint imposed by orders fixing the limits of arrest.

(d) Breaking. Breaking arrest is committed when the person in arrest infringes the limits set by orders. The reason for the infringement is immaterial. For example, innocence of the offense with respect to which an arrest may have been imposed is not a defense.

(e) Illegal arrest. A person may not be convicted of breaking arrest if the arrest is illegal. An arrest ordered by one authorized to do so is presumed to be legal in the absence of some evidence to the contrary. Ordinarily, the legality of an arrest is a question of law to be decided by the military judge.

(4) Escape from custody.

(a) Custody. "Custody" is restraint of free locomotion imposed by lawful apprehension. The restraint may be physical or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders. Custody is temporary restraint intended to continue until other restraint (arrest, restriction, confinement) is imposed or the person is released.

(b) Authority to apprehend. See subparagraph (1)(b) above.

(c) Escape. For a discussion of escape, see subparagraph c(5)(c), below.

(d) Illegal custody. A person may not be convicted of this offense if the custody was illegal. An apprehension effected by one authorized to apprehend is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of an apprehension is a question of law to be decided by the military judge.

(e) Correctional custody. See paragraph 70.

(5) Escape from confinement.

(a) Confinement. Confinement is physical restraint

imposed under R.C.M. 305, 1101, or paragraph 5b, Part V, MCM. For purposes of the element of post-trial confinement (subparagraph b(5)(d), above) and increased punishment therefrom (subparagraph e(4), below), the confinement must have been imposed pursuant to an adjudged sentence of a court-martial, and not as a result of pretrial restraint or nonjudicial punishment.

(b) Authority to order confinement. See R.C.M. 304(b), 1101, and paragraphs 2 and 5b, Part V, MCM, concerning who may order confinement.

(c) Escape. An escape may be either with or without force or artifice, and either with or without the consent of the custodian. However, where a prisoner is released by one with apparent authority to do so, the prisoner may not be convicted of escape from confinement. See also paragraph 20c.(1)(b). Any completed casting off of the restraint of confinement, before release by proper authority, is an escape, and lack of effectiveness of the restraint imposed is immaterial. An escape is not complete until the prisoner is momentarily free from the restraint. If the movement toward escape is [*30083] opposed, or before it is completed, an immediate pursuit follows, there is no escape until opposition is overcome or pursuit is eluded.

(d) Status when temporarily outside confinement facility. A prisoner who is temporarily escorted outside a confinement facility for a work detail or other reason by a guard, who has both the duty and means to prevent that prisoner from escaping, remains in confinement.

(e) Legality of confinement. A person may not be convicted of escape from confinement if the confinement is illegal. Confinement ordered by one authorized to do so is presumed to be lawful in the

absence of evidence to the contrary. Ordinarily, the legality of confinement is a question of law to be decided by the military judge.

d. Lesser included offenses.

(1) Resisting apprehension. Article 128-assault; assault consummated by a battery

(2) Breaking arrest.

(a) Article 134-breaking restriction

(b) Article 80-attempts

(3) Escape from custody. Article 80-attempts

(4) Escape from confinement. Article 80-attempts

e. Maximum punishment.

(1) Resisting apprehension. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) Flight from apprehension. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) Breaking arrest. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(4) Escape from custody, pretrial confinement, or confinement on bread and water or diminished rations imposed pursuant to Article 15. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(5) Escape from post-trial confinement. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Resisting apprehension.

In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, 19 _____, resist being apprehended by_____, (an armed force policeman) (_____), a person authorized to apprehend the accused.

(2) Flight from apprehension.

In that _____ (personal jurisdiction data), did (at/on board-location) (subject matter jurisdiction data, if required), on or about _____ 19____, flee apprehension by _____ (an armed force policeman) (_____), a person authorized to apprehend the accused.

(3) Breaking arrest.

In that _____ (personal jurisdiction data), having been placed in arrest (in quarters) (in his/her company area) (_____) by a person authorized to order the accused into arrest, did, (at/on board-location) on or about _____ 19_____, break said arrest.

(4) Escape from custody.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction

data, if required), on or about _____ 19_____, escape from the custody of_____, a person authorized to apprehend the accused.

(5) Escape from confinement.

In that _____ _____ (personal jurisdiction data), having been placed in (post-trial) confinement in (place of confinement), by a person authorized to order said accused into confinement did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 19_____, escape from confinement."

APPENDIX

Sec. 4. These amendments shall take effect on May 27, 1998, subject to the following:

(a) The amendments made to Military Rules of Evidence 412, 413, and 414 shall apply only to courts-martial in which arraignment has been completed on or after June 26, 1998.

(b) Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to June 26, 1998, which was not punishable when done or omitted.

(c) The amendment made to Part IV, para. 45c.(2), authorizing a mistake of fact defense as to age in carnal knowledge prosecutions is effective in all cases in which the accused was arraigned on the offense of carnal knowledge, or for a greater offense that is later reduced to the lesser included offense of carnal knowledge, on or after February 10, 1996.

(d) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to May 27, 1998, and any such nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

WILLIAM J. CLINTON

/ S /

THE WHITE HOUSE,

May 27, 1998.

APPENDIX

In pertinent part, the Constitutional and Statutory provisions involved in the petition are reprinted below:

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. Art. II, § 2, cl. 1

The President shall be Commander in Chief of the Army and Navy of the United States . . . and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

U.S. CONST. Art. I, § 8, cl. 14

To make Rules for the Government and Regulation of the land and naval Forces.

STATUTES INVOLVED

10 U.S.C. § 895 (1996)

Article 95 - Resistance, flight, breach of arrest, and escape

Any person subject to this chapter who –

(1) resists apprehension;
(2) *flees from apprehension;*
(3) breaks arrest; or
(4) escapes from custody or confinement; shall be punished as a court-martial may direct.

(Emphasis added).

10 U.S.C. § 818 (1996)

> Article 18. Jurisdiction of general courts-martial
>
> [G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, *under such limitations as the President may prescribe* . . .

(Emphasis added).

10 U.S.C. § 856 (1996)

> Article 56 – Maximum Punishment Limits
>
> The punishment which a court-martial may direct for an offense may not exceed *such limits as the President may prescribe for that offense.*

(Emphasis added).